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No. 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

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I. The Interstate Commerce Commission Is Not Required To Make Specific Findings Under Section 11341(a) In Order To Exempt Carriers From Laws That Frustrate Implementation Of Transactions Approved Under Sections 11343 and 11344.

A. Respondents' assertion that section 11341(a) is not self-executing is contrary to the statutory language, legislative history, the Court's previous decisions, and public policy.

Respondents Brotherhood of Locomotive Engineers ("BLE") and United Transportation Union ("UTU") assert that, to give effect to the "as necessary" language of the Interstate Commerce Act's ("ICA") statutory exemption provision, 49 U.S.C. § 11341(a) (1982), the Interstate Commerce Commission ("ICC" or "Commission") is required to make specific findings exempting a carrier from obligations of laws that pose an obstacle to the implementation of a financial transaction approved under 49 U.S.C. §§ 11343 and 11344 (1982). They argue that the ICC not only must determine that the transaction is in the "public interest" under section 11344, but also must make a separate "necessity finding" under section 11341(a) that (1) the policies of the conflicting statute have been expressly considered; (2) the conflicting statute would absolutely prohibit the implementation of the approved financial transaction; and (3) the proposed terms of the approved transaction are "the *only* method by which the transaction can be accomplished." UTU Br. at 24-28 (emphasis added).[1] None of these arguments has any merit.

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[1] Citations in the form "UTU Br. at ____" refer to respondent UTU's brief, filed August 15, 1986. Respondent BLE's brief, filed August 7, 1986, is referred to herein as "BLE Br." Petitioner MKT's petition for writ of certiorari, filed November 7, 1985, is referred to herein as "MKT Pet."; its opening brief on the merits, filed June 7, 1986, is referred to herein as "MKT Op. Br."

1. Respondents' affirmative assertions are unsubstantiated.

As we demonstrated in our opening brief (at 35-38), this Court has long since determined that a separate necessity finding is not required by section 11341(a). *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948); *see also McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). In *Schwabacher*, the Court stated that once the ICC makes its determination that a voluntary railroad merger is "consistent with the public interest" within the meaning of section 5(2)(b) of the ICA (the predecessor of section 11344), the exemption provisions of section 5(11) (the predecessor of section 11341(a)) automatically apply to enable the carriers to effect the transaction.

BLE's brief is virtually silent on *Schwabacher*; UTU's attempt to distinguish it is unconvincing. UTU contends that *Schwabacher* involved a conflict between the ICA and a state law, two matters that were "committed to the complete control of the Commission," UTU Br. at 25, but that the ICC may not resolve conflicts between the ICA and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160 (1982), because the ICC does not have jurisdiction over labor matters. UTU Br. at 25-26. However, UTU ignores that for decades the ICC and the courts have recognized that the Commission does indeed have "jurisdiction" to resolve labor matters in the context of the implementation of transactions approved under the ICA. *See infra* pp. 12-20.

Respondents also maintain that the allegedly required necessity determination must include certain elements. First, it must be accompanied by evidence that the ICC "considered the policies expressed in [conflicting] laws in determining whether the relevant transaction is within the public's interest." UTU Br. at 24 (citing *United States v. ICC*, 396 U.S. 491 (1970), and *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert.*

denied, 105 S. Ct. 1171, 1172 (1985)). As we noted in our opening brief, we agree that, once a party has raised the question of whether a conflicting law precludes approval of a proposed transaction, the ICC must undertake such a task. MKT Op. Br. at 37-38. But we also noted that such analysis was accomplished in the public interest proceeding held pursuant to section 11344. In accordance with the statutory requirements to consider "the interest of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), and to impose labor protective conditions, 49 U.S.C. § 11347 (1982 & Supp. III 1985), the ICC discussed at length the effect the proposed consolidation and trackage rights transactions would have on labor. Indeed, it was called upon by the unions to impose a greater level of labor protection than the standard section 11347 labor protective conditions. *Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, 366 I.C.C. 459, 618-22 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171, 1172 (1985). It declined to do so, 366 I.C.C. at 620-22, and was upheld on appeal, 736 F.2d at 725. At no point in the original proceeding or in their original appeal of the consolidation order did the UTU or BLE allege that allowing MKT to use its own crews violated the policies of RLA (or any other statute).[2]

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[2] When the respondents did raise this issue for the first time months later in their petitions for reconsideration of the ICC's order denying BLE's petition for clarification, the ICC squarely addressed the issue. It noted that in its section 11344 proceeding it "gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22." Decision of the Interstate Commerce Commission, October 25, 1983, MKT Pet. A44-45.

The ICC also stated:

> The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective

Another linchpin in respondents' argument is that section 11341(a)'s override of conflicting statutes "applies 'only if those . . . laws pose an *obstacle* to the transaction.' " UTU Br. at 27 (quoting from the majority's opinion below) (emphasis added). Both the majority and respondents define "obstacle" as something that would absolutely prohibit the transaction. In its opening brief, MKT pointed out that none of the three Supreme Court cases relied upon by the majority below supported that proposition: *Texas v. United States*, 292 U.S. 522 (1934); *Callaway v. Benton*, 336 U.S. 132 (1949); and *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948). MKT Op. Br. at 34-35. Neither respondent challenges MKT on this crucial issue. UTU's discussion, especially its use of *Texas v. United States* (which it concedes allowed the ICC to immunize a carrier from the provisions of a state statute found to impose "unnecessary" and "burdensome" expenditures upon the carrier), UTU Br. at 27-28, demonstrates a law need not be a complete "obstacle" to the implementation of an approved transaction before immunity attaches.

UTU finally asserts that section 11341(a)'s override will not operate unless and until "the Commission [examines] the means proposed by the carrier to ascertain whether that is the *only* method by which the transaction can be accomplished." UTU Br. at 26 (citing *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978)) (emphasis added). This assertion is belied by the statutory language and legislative history of sections 11341(a) and 11344.

Section 11344 specifically states that the ICC "may impose conditions governing the [approved] transaction." Sec-

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conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Id. at A45.

tion 5(2)(a) of the Transportation Act of 1940 (the predecessor to section 11343) gave the ICC "explicit powers over trackage rights," including "the power to determine the terms and conditions under which trackage rights may be acquired." *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 146-47 (1946). Accordingly, the ICC has power not only to approve the proposed transaction, but also to impose conditions upon the transaction. Section 11341(a) then exempts "*anything authorized*"[3] by the ICC from conflicting laws that frustrate its implementation.

Here, pursuant to sections 11343 and 11344, the ICC unequivocally authorized MKT to operate its trains, using its own crews, over the Missouri Pacific lines. Pursuant to section 11341(a), that operation, including the crew selection provision, is exempt from all conflicting laws that frustrate its implementation. Nothing in the statute requires an additional determination that the operation of MKT trains by its own employees is the "only means" to effectuate the trackage rights operation.

Nor does *City of Palestine* support UTU's contention. The Fifth Circuit held that the section 11341(a) override of conflicting statutes is limited in that the ICC could not immunize terms of the transaction that were "irrelevant to the success of approved transactions." 559 F.2d at 415.

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[3] This language appeared in section 407, paragraph (8) of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 482 (1920), which relieved carriers from the operation of all laws "in so far as may be necessary to enable them to do *anything authorized* or required by any order made under and pursuant to the foregoing provisions of this section." (Emphasis added.) In 1940, the language was changed slightly to read that carriers were relieved from all legal restraints "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for *in accordance with the terms and conditions, if any, imposed by the Commission*[.]" Transportation Act of 1940, ch. 722, § 5(11), 54 Stat. 898, 908 (1940) (emphasis added). UTU concedes the language in section 11341(a) has the same meaning as in *all* versions since 1920. UTU Br. at 19.

UTU fails to explain how a court's refusal to immunize an approved term of a transaction because it was "irrelevant to the success of the transaction" equates to a requirement that the ICC remove a proposed term because it is not the *only means* through which the transaction may be implemented.

UTU undercuts its own contrary contention by admitting that "where the order of the agency clearly specifies what is to be performed, the application of Section 11341(a) should be obvious." UTU Br. at 21 (relying on *Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415 (1929)). This is, we submit, *precisely* our case.[4] The ICC's order could not have been clearer: in order to ameliorate the anticompetitive effects of the principal consolidation transaction, the ICC conditioned the transaction by approving "[i]n Finance Docket No. 30,000 (Sub-Nos. . . . 25 . . .), the applications to acquire trackage rights, *to the extent and under terms and conditions discussed in the decision*[.]" 366 I.C.C. at 654, ordering paragraph 14 (emphasis added).[5]

MKT's application for the trackage rights expressly provided that MKT would operate its trains along the joint track "with its own employees, and at its sole cost and expense[.]" MKT Trackage Rights Application, Exhibit 2, Section 5, I.C.C. F.D. No. 30,000 (Sub-No. 25) (filed Jan.

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[4] The ICC here made clear what MKT was authorized to do. Exactly the opposite was true in *Central New England*. The ICC was not a party to that case nor was its explanation of what it had in fact authorized and exempted from all other laws sought or available. Instead, the exemption issue was raised as an affirmative defense in a contract action between two private litigants. 279 U.S. at 416-20.

[5] If there were any doubt as to the clarity of the consolidation order, the orders denying respondent BLE's petition for clarification (served May 18, 1983) and respondents' petitions for reconsideration (served October 25, 1983) were indisputably clear: the ICC determined the approved trackage rights transaction, with its crew selection provision, was "consistent with the public interest."

13, 1981). The ICC specifically discussed MKT's proposal to use its own crews; none of the modifications to the application discussed in the decision cuts back upon that crucial proposal. 366 I.C.C. at 566-72. Surely, the ICC was not obligated to reprint the MKT application in the ordering paragraphs of its decision; it was entitled to incorporate the application, and its modifications, by reference without sacrificing specificity as to exactly what it was approving. Its actions made the application of section 11341 "obvious."

2. Respondents' challenges to MKT's interpretation are unsubstantiated.

Respondent UTU challenges petitioners' interpretation that section 11341(a) is self-executing by inventing a strawman: that our view would render the ICC supinely captive to whatever schemes the carriers may propose and hence whatever blatant statutory overrides they may conceive. UTU Br. at 20. But we have never suggested that the ICC has only two options when presented with an application: deny it or approve it as presented. The ICC has broad authority to impose conditions upon proposed transactions to make them consistent with the public interest. *See* 49 U.S.C. § 11344(c).[6] Moreover, the notion that the ICC is stuck with whatever the carriers propose is belied by the existence of this dispute. The ICC conditioned its approval of the consolidation upon the granting of trackage rights to MKT.

UTU additionally contends that, because the unions are powerless to control whether the carriers exercise the permissive authority conferred by the ICC, "[i]t is contrary to elementary principles of statutory construction to assert that this form of statutory scheme also gives [the ICC]

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[6] Although the ICC lacks the power of legal compulsion, its power to condition has practical compulsory force because it leaves the proponents of a transaction with the choice of either accepting the conditions or abandoning a desired transaction.

power to control and direct [the union's behavior.]" UTU Br. at 17. In response, we note that the courts have consistently held that the "statutory scheme" was expressly designed to preclude the unions from controlling whether approved transactions were consummated; Congress did not intend to give unions a veto power over the implementation of approved transactions. *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Moreover, respondents were hardly strangers to this proceeding. Both the UTU and BLE took active roles in the approval proceeding, opposing the principal consolidation transaction, opposing the trackage rights application, and seeking enhanced labor protective conditions. They had adequate opportunity to object to the crew assignment provisions of MKT's application for trackage rights and to argue that those provisions undermined the policies of the RLA. Nowhere in that flurry of active participation did the unions raise such issues.[7] In the end, the ICC did exactly what the UTU now asks it to do: "impos[e] a fair and equitable arrangement to protect the interests of employees who may be affected [by the proposed trackage rights]." Comments of Brotherhood of Maintenance of Way Employees, Finance Docket No. 30,000 (Sub-Nos. 20-

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[7] The ICC should be held accountable to rule only on issues and objections presented by the interested parties in the section 11344 public interest proceeding. Because the unions did not challenge the crew selection provision of the MKT trackage rights application, the ICC should not be expected to rule on such issues *sua sponte*.

33) 2-3 (quoted in UTU Br. at 9). The ICC conditioned the grant of trackage rights by imposing the standard section 11347 labor protective conditions. 366 I.C.C. at 654, ordering paragraph 19.

Finally, respondent UTU repeatedly refers to the ICC decision as displacing existing contractual obligations. UTU Br. at 8, 10, 12-14. But in its brief, and indeed in its presentation to the ICC, the UTU is entirely silent as to what those contractual obligations may be. In its order denying reconsideration of the petition for clarification, the ICC correctly found that the unions pointed to *no* specific contractual right that was allegedly infringed, and, for that matter, failed to demonstrate any alleged violation of the RLA. Decision of Interstate Commerce Commission, October 25, 1983, MKT Pet. A45-48.

B. Assuming *arguendo* that specific findings under section 11341(a) are required, the ICC made such findings in the instant case.

Respondents allege that the ICC order was deficient in that it offered no "shred of reasoning" to support its view that MKT's use of its own crews was (1) a "material term" of the transaction and (2) necessary to the implementation of the transaction. UTU Br. at 29-30; BLE Br. at 35. No specific "reasoned basis" for that determination is required, for as Judge MacKinnon noted:

> [T]he necessity for the waiver is clear . . . . [T]he Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

MKT Pet. A32 (emphasis in original).

Moreover, a subsequent event—the threatened strike against Missouri Pacific by the UTU—vindicated the conclusion that RLA procedures would interfere with the implementation of the transaction. Had the strike not been enjoined by court order, it would have shut down the MKT trackage rights operation. That, in turn, would have frustrated the implementation of the principal consolidation transaction, because, as the ICC determined, the consolidation was inconsistent with the public interest absent the trackage rights operation.

The ICC adequately and specifically explained the necessity of conditioning its approval of the consolidation transaction upon the grant of MKT's trackage rights request. 366 I.C.C. at 566-72. It did not approve MKT's request in the abstract. As Judge MacKinnon stated: "The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger." MKT Pet. A24 (emphasis in original).[8] Thus, respondents are incorrect when they argue that additional findings by the ICC are required to justify an exemption from the RLA in this case.

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[8] Section 11341(a) should require the ICC to determine only that the trackage rights transaction was "necessary" to the approval of the principal consolidation transaction. To require the ICC additionally to determine that the train crew selection provision was "necessary" to the trackage rights transaction, as the UTU suggests, would force the ICC into a never-ending maze of making affirmative necessity determinations for every term or provision of every proposed transaction. Such requirement would completely undermine the statutory goal of encouraging voluntary mergers and consolidations by, in essence, requiring the ICC to redesign every proposed transaction if the "necessity" for each and every term could not be adequately explained.

II. Pursuant To Section 11341(a), The Interstate Commerce Commission Has The Power To Relieve A Carrier Of RLA Procedures In The Implementation Of A Transaction Approved Under The ICA.

Respondents UTU and BLE assert that section 11341(a) cannot under *any* circumstances operate to relieve the parties to an approved transaction from compliance with RLA procedures. Both respondents contend that this is so because the ICC "lacks jurisdiction" over labor relations. BLE Br. at 28-34; UTU Br. at 31-50. In addition, UTU maintains that, in any event, even if the ICC once had authority to exempt transactions from the RLA under section 11341, Congress eliminated that authority in 1976 by passing the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31 (1976). UTU Br. at 45-50. These assertions are not only without merit but are, more importantly, completely irrelevant to the present action.

Respondents have sought to raise these broad issues, which are the subject of their petitions for certiorari that are still pending (Nos. 85-983 and 85-997), in the guise of responding to petitioners' briefs. Despite the irrelevancy of these issues to this proceeding, we will address respondents' arguments in the event the Court chooses to broaden the scope of this proceeding. As we demonstrate below, it is well settled that the section 11341 exemption applies to the RLA, as well as every other statute impeding the implementation of an approved transaction. Moreover, the Court of Appeals, by remanding the orders to the ICC for a specific determination that the carriers are exempt from the RLA, has already decided that section 11341(a) does apply to the RLA. That implicit finding was the predicate for the unions' petitions in Nos. 85-983 and 85-997.

A. Prior to the passage of the 4R Act, it was settled that rail labor could not invoke the RLA as a source of independent right to negotiate the terms of implementation of ICC-approved transactions.

Respondents assert that Congress "intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act." UTU Br. at 38. In short, respondents contend that the RLA is not a "law" from which carriers may be exempted by operation of section 11341(a).

In the light of plain statutory language, history, and case law precedent, respondents' position cannot be supported. For 40 years prior to the passage of the 4R Act, the ICC, the courts, rail labor, and the carriers all recognized that the ICC protected labor's interests by imposing labor protective conditions on its approval of transactions under the ICA. Once the ICC has performed that duty, the unions have no basis for asserting that they have a right, based on the RLA, to negotiate with carriers over the terms of implementation of ICC-authorized transactions.

The language of section 11341(a) is plenary, and gives the ICC exclusive jurisdiction to approve transactions and relieve carriers from restraints of *all* other laws as necessary to effectuate the transaction. As established in the extensive analysis of the legislative history contained in MKT's opening brief (at 19-32), which respondents have not refuted, section 11341(a) sweeps aside the provisions of the RLA to the extent they would impede the implementation of an approved transaction.[9]

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[9] Respondent UTU's use of the legislative history of section 11341(a) is misleading. See UTU Br. at 35-36. UTU correctly observes that *temporary* title (Title I) of the Emergency Railroad Transportation Act ("ERTA"), ch. 91, 48 Stat. 211 (1933), excluded the RLA from the laws that could be exempted in connection with actions *compelled* by the coordinator. But as we pointed out in our opening brief (at 22-24),

The courts have confirmed that carriers may be exempted from the RLA pursuant to section 11341(a). *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). (MKT Op. Br. at 38.) In that case, the Eighth Circuit concluded that "Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers," 314 F.2d at 431, and held that the ICC's approval of the transaction displaced the RLA. To hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." *Id.* at 431-32.[10]

BLE v. CNW has been widely followed as a correct application of the law. Other courts repeatedly have applied the same reasoning to conclude that the RLA procedures do not govern the resolution of disputes arising out of the implementation of ICC-authorized transactions. *Missouri Pacific R.R.*, 782 F.2d at 111 (affirming "that MOPAC is exempted under § 11341(a) . . . from the requirements of the Railway Labor Act"); *Burlington Northern, Inc. v. American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam) (employee protection agreement adopted by ICC as condition to its approval of merger "not inconsistent with any provision of the Railway

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it is section 202, paragraph (15) of the *permanent* ERTA title (Title II) that is the predecessor of section 11341(a), and that provision contains no such exclusion. This distinction, we explained, reflects an evident congressional recognition that there is no exception for the RLA implicit in the predecessors to section 11341(a).

[10] Respondents' attempt to distinguish *BLE v. CNW* on the ground that the case centered on the enforcement of a voluntary agreement between a carrier and a union. BLE Br. at 35 n.16; UTU Br. at 42-43. This argument misses the mark. The court's decision was based on the ICC's authority; the genesis of the conditions sought to be enforced was irrelevant.

Labor Act, and if it were its provisions would be controlling"), *cert. denied*, 421 U.S. 975 (1975); *Nemitz*, 436 F.2d at 845-46 (the parties may not invoke RLA remedies to enforce the employee protective conditions imposed on an ICC-approved transaction); *United Transportation Union v. Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174-75 (N.D. Ohio 1971) (requirements of ICC-approved job protection agreement supplant RLA rights); *see also Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986) (ICC authorization of transaction under 49 U.S.C. § 10505 exempts transaction from RLA), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 7, 1986).

The same results were reached in cases arising in the airline industry, which is also subject to the RLA. Every court to consider the question has held that collective bargaining agreements, and employees' rights to insist the RLA procedures be followed in changing the terms of those agreements, must necessarily yield when the Civil Aeronautics Board authorized an airline consolidation under its own statutory authority. *International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *American Airlines, Inc.*, 445 F.2d at 896 97; *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).[11]

The ICC has also recognized that the provisions of the labor protective conditions displace the RLA procedures in resolving labor disputes in the context of implementing an ICC-approved transaction. In the landmark case of *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967), the ICC considered the inter-relationship among its

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[11] The foregoing cases also refute respondents' assertion that because protective conditions are imposed on carriers, and not on the unions representing the employees of the carriers, the ICC cannot direct the unions to take (or to forego) any actions. UTU Br. at 37-38. *See, e.g., American Airlines, Inc.*, 445 F.2d at 897.

own protective conditions, the provisions of Washington Job Protection Agreement of 1936 ("WJPA"),[12] and the RLA. The ICC concluded that the substance of WJPA was included in the standard protective conditions it had imposed. *Id.* at 153. The mutual commitments of the WJPA parties were, therefore, to be enforced through the procedural mechanisms of the labor protective conditions, not the existing labor contract. *Id.* at 162-64. Thus, RLA procedures were already displaced; the provisions of WJPA, not the RLA, would govern the negotiation of an implementing agreement. *Id.* at 165. This is no less true when the substance of WJPA is imposed as a labor protective condition.[13]

Respondents predictably rely on *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), for the proposition that the ICC's jurisdiction under section 11341(a) is limited. BLE Br. at 46-47; UTU Br. at 41-42. But *Texas & N.O.* does not help them. There the issue was whether the anti-injunction provision of the Norris-LaGuardia Act, 29

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[12] The WJPA was a negotiated collective bargaining agreement among most of the nation's railroads and rail labor unions. It established both a schedule of compensatory benefits for employees affected by railroad consolidations and a general procedural mechanism for negotiating, and if necessary, arbitrating specific agreements to cover the workforce adjustments necessary to the implementation of approved transactions. 331 I.C.C. at 155-56.

[13] Although in the passage quoted by UTU (Br. at 40-41) and relied upon by BLE (Br. at 28-29), the ICC did note that the rights of employees under existing collective bargaining agreements, under WJPA, and under the protective conditions "are independent, separate, and distinct rights," 331 I.C.C. at 169, it simultaneously made clear that the mechanisms of the RLA itself played no part in the working out of the rearrangements necessary to effectuate authorized transactions. In the ICC's view, WJPA served the purpose of *furthering* transactions, "for without something comparable to it, section 6 of the Railway Labor Act (45 U.S.C. 156) would seriously impede mergers." 331 I.C.C. at 171.

U.S.C. §§ 101-115 (1982), was displaced by section 5(11). The court resolved the case by deciding there was no conflict, not that Norris-LaGuardia was paramount. Most importantly, the Fifth Circuit made clear its view that if there *was* a clash between the labor laws and section 5(11), "we would have to conclude that Norris-LaGuardia was preempted by section 5(11), even though section 5 is not labor legislation." 307 F.2d at 158.

B. The 4R Act did not provide that RLA procedures apply to determine the terms of implementation of an approved transaction.

UTU contends that, in any event, any authority the ICC may have had under section 11341(a) to exempt transactions from the RLA was eliminated in 1976 as a result of a provision in the 4R Act purportedly guaranteeing to rail employees the right to engage in collective bargaining, under the procedures of the RLA, over the implementation of ICC-authorized transactions. The mechanism ostensibly accomplishing this result is the 4R Act's reference to a provision in the Rail Passenger Service Act of 1970 ("Amtrak Act"), Pub. L. No. 91-518, 84 Stat. 1327 (1970), which in turn implicates language in the protective conditions adopted by the Secretary of Labor under that statute.[14] Those protective conditions direct that "all collective bargaining and other rights . . . of the railroad's [affected] employees . . . shall be preserved unless changed by future

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[14] Section 402(a) of the 4R Act amended section 5(2)(f) of the ICA (the predecessor of section 11347) to read, in pertinent part:

> [T]he Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected . . . . Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

90 Stat. 62.

collective bargaining agreements[.]"[15] UTU sees in this chain (1) a statutory directive that actions taken under protective conditions imposed by the ICC pursuant to section 11347 cannot have the effect of altering existing collective bargaining arrangements without employee consent attained through RLA procedures; and, thereby, (2) the implied removal of the RLA from the exemption provision of section 11341(a).

In fact, the 4R Act has no such broad effect. The Amtrak Act provision was derived from a provision of the Urban Mass Transportation Act of 1964 ("UMTA"), Pub. L. No. 88-365, 78 Stat. 302 (1964) (now codified at 49 U.S.C. app. §§ 1601-1618 (1982)), which authorized federal financial aid to state and local governments for the improvement of urban mass transit systems. UMTA was passed at a time when many private transit companies were in precarious financial condition; the statute was intended, in part, to assist local governments to acquire such failing companies so that local communities would not be without mass transit. *See Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982).

Congress recognized that many states denied public employees the right to bargain collectively, and was concerned that a federally sponsored shift from private to public ownership not become the occasion for the loss of existing collective bargaining rights under state law. Accordingly, Congress in section 13(c) of UMTA, 49 U.S.C. app. § 1609(c), required that labor protective arrangements must be imposed that would ensure "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; [and] the continuation of collective bargaining rights[.]" The Secretary of Labor was

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[15] This language is found in Art. I, § 2 of the "Appendix C-1 conditions," which are discussed in the text below.

instructed to certify only those labor protective arrangements that preserved the collective bargaining benefits and rights. *See Jackson Transit Authority*, 457 U.S. at 17-18. Thus, although the language of section 13(c) is facially broad, its well-understood meaning is specific and circumscribed.

The language of UMTA § 13(c) reappeared several years later in the Amtrak Act, which created the National Railroad Passenger Corporation ("Amtrak") and laid the foundation for a national rail passenger system. Section 405 of the Amtrak Act, 45 U.S.C. § 565 (1982), mandated that the Secretary of Labor certify that fair and equitable arrangements have been made for the protection of employees affected by private railroads' discontinuance of intercity rail passenger service—*i.e.*, the turnover of passenger operations to Amtrak. In language adopted verbatim from section 13(c) of UMTA, section 405(b) of the Amtrak Act directed that the Secretary of Labor may certify only those labor protective arrangements that, *inter alia*, provide for the preservation of benefits under existing collective bargaining agreements and for the continuation of collective bargaining rights.

Congress' use of the identical language of UMTA § 13(c) in the Amtrak Act indicates that it intended to provide protections for Amtrak employees comparable to those established by section 13(c). Moreover, the national legislative director of the UTU stated in support of such protection that it was "designed to serve the identical policy expressed in" UMTA. *Supplemental Hearings on H.R. 17849 and S. 3706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970). And the Secretary of Labor, whose job it would be to administer the provision, understood "that the coverage under the protective arrangements provision . . . is substantially of the same scope as the protective arrangements provision" of UMTA. *Id.* at 65.

The protective conditions mandated by the Amtrak Act were developed and certified in 1971 by Secretary of Labor Hodgson. The provision of Appendix C-1[16] that embodies the Amtrak Act's directive to provide for the continuation of collective bargaining rights is Article I, § 2, which states:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The rail labor unions assuredly did not interpret Article I, § 2 of Appendix C-1 as a guarantor of newly reinvigorated RLA § 6 negotiating rights. To the contrary, the unions attacked Appendix C-1 as being insufficiently protective of employee interests. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). This litigation would have been thoroughly beside the point if Appendix C-1 already contained a provision assuring employees of the right to ignore the protective conditions altogether and seek to negotiate implementing agreements under the procedures of the RLA. Yet rail labor claimed no such right.

As stated above, section 402(a) of the 4R Act amended section 5(2)(f) of the ICA to require that the "fair and equitable arrangement to protect the interests of the railroad employees affected" by an ICC-authorized transaction "contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of

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[16] The conditions are known as "Appendix C-1" because they were attached as Appendix C-1 to the standard train discontinuance contract that Amtrak entered into with each rail passenger carrier.

the Rail Passenger Service Act (45 U.S.C. 565)." 90 Stat. 62 (codified at 49 U.S.C. § 11347).[17] It is now undisputed that the Appendix C-1 conditions constitute the conditions "established pursuant to" section 405 of the Amtrak Act. *New York Dock Ry. v. United States*, 609 F.2d 83, 93 (2d Cir. 1979).

Nothing in the 4R Act, or its legislative history, suggests that Congress intended that the protections established by Secretary Hodgson in Article I, § 2 take on new or enlarged meaning when imposed by the ICC, pursuant to the command of the 4R Act, in subsequent rail transactions.

The policy underlying the 4R Act also precludes such a result. The 4R Act amended the consolidation provisions of the Interstate Commerce Act "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system[.]" S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34; *see Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 301 (D.C. Cir. 1983). Congress expected that the amended 49 U.S.C. § 5(2)(f) (now 49 U.S.C. § 11347)—an integral part of the railroad consolidation regulatory framework—and the labor protective conditions it required would facilitate railroad transactions, not frustrate them. Resort to the protracted RLA negotiation process would negate this explicit congressional policy.

CONCLUSION

The Court should reverse the Court of Appeals' decision.

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[17] This provision of the 4R Act, proposed in the House of Representatives and added to the Senate bill in conference, was a "last-minute addition" without specific legislative history. *New York Dock Ry. v. United States*, 609 F.2d 83, 93 (2d Cir. 1979).

Respectfully submitted,

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